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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 385

J. L. BRANDEIS & SONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 3, 4–12)[1] is reported in 142 F. (2d) 977. The findings of

[1] In referring to the record the same method is used as that followed in the petition for certiorari (Pet. 2). References to the record certified by the Circuit Court of Appeals, containing the petition to review and answer in the court below, together with the pleadings before the National Labor Relations Board, are designated "(R. 1, ——)." References to volumes 1 and 2, printed by petitioner as an Appendix to its brief in the court below, are designated respectively "(R. 2, ——)" and "(R. 2a, ——)." References to the volume containing the opinion of the court below, the decree, petitioner's motion for a stay, and the order staying the issuance of a certified copy of such decree, are designated "(R. 3, ——)."

fact, conclusions of law, and order of the National Labor Relations Board (R. 1, 67–76) are reported in 53 N. L. R. B. 352.

JURISDICTION

The decree of the court below (R. 3, 12–14) was entered on June 23, 1944. The petition for a writ of certiorari was filed on August 22, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

The only question presented is whether the National Labor Relations Act is applicable to petitioner, which owns and operates a large department store in Omaha, Nebraska.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings, and pursuant to a stipulated record (R. 1, 37–46) the Board, on November 3, 1943, found that petitioner had engaged in certain unfair labor practices affecting commerce. Accordingly, the Board entered the order involved here (R. 1, 67–76). The Board's findings concerning the applicability of the Act to

petitioner (R. 1, 69–71) may be summarized as follows:[2]

Petitioner, a Nebraska corporation, owns and operates a retail department store in Omaha, Nebraska (R. 1, 69–70; R. 2, 9–10, 55). During the fiscal year ended January 31, 1943, petitioner purchased nearly $5,000,000 worth of merchandise for resale, of which about 75 percent, valued at more than $3,700,000, was purchased in States other than Nebraska, and was delivered to petitioner from points outside Nebraska (R. 1, 70; R. 1, 40, R. 2, 38). During the same period petitioner's total sales amounted to $7,730,630, of which approximately $150,000 worth were made to out-of-State customers (R. 1, 70; R. 2, 52, R. 2a, 512). Petitioner's mail orders for the fiscal year ended January 31, 1943, were approximately valued at $121,274, of which about $20,799 represented mail order sales to customers outside Nebraska (R. 1, 70; R. 2a, 513). During the same period respondent caused to be delivered to customers outside Nebraska approximately 8,900 packages (R. 1, 70; R. 2, 48–49). In order to promote sales, petitioner advertises extensively in the *Omaha World Herald,* which has a substantial circulation in the neighboring State of Iowa, and in the *Non Pariel,* a newspaper published and circulated in Council Bluffs, Iowa (R. 1, 70; R. 2, 17–18, 19, 26, R. 2a, 511).

[2] In the following statements the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Upon these facts the Board concluded that petitioner was subject to the Act (R. 1, 69–71). On December 6, 1943, the petitioner filed a petition in the Circuit Court of Appeals for the Eighth Circuit to review and set aside the Board's order (R. 1, 1–9). The Board requested dismissal of the petition for review and enforcement of its order (R. 1, 9–14). On June 7 and June 23, 1944, respectively, the court below handed down its decision and decree enforcing the Board's order in full (R. 3, 4–12, 12–14).

ARGUMENT

The Board and the court below, upon full consideration of the relevant facts, determined that petitioner's activities fall within the scope of the Act. We think that their determination was correct, and that there is no occasion for further review. No questions of general importance are presented, and no conflict of decisions is shown.[3]

[3] The general dicta concerning the Board's jurisdiction in *Consolidated Edison Company* v. *National Labor Relations Board*, 95 F. (2d) 390, 393–394 (C. C. A. 2), aff'd, 305 U. S. 197, 220, and *National Labor Relations Board* v. *White Swan Company*, 118 F. (2d) 1002 (C. C. A. 4), upon which petitioner relies (Pet. 10, 24–26), do not create any conflict of decisions. The facts in both cases were wholly different from those here presented; and, in any event, the Board's jurisdiction was sustained in both cases. *Schroepfer* v. *A. S. Abell Co.*, 138 F. (2d) 111 (C. C. A. 4) arose under the Fair Labor Standards Act and merely shows that the same company may be exempt from that statute under the narrower concept of "in commerce" and yet be amenable to the National Labor Relations Act under the broader concept of

Petitioner annually sells and distributes merchandise valued at more than $3,700,000, which is received through the usual channels of interstate commerce. This fact alone brings petitioner within the ambit of the commerce clause. Cf. *Local 167, International Brotherhood of Teamsters* v. *United States,* 291 U. S. 293, 297; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290–291; *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241; *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 115 F. (2d) 414, 416 (C. C. A. 4), reversed and remanded on other grounds, 314 U. S. 469, 476; *National Labor Relations Board* v. *J. L. Hudson Co.,* 135 F. (2d) 380 (C. C. A. 6), certiorari denied, 320 U. S. 740.

An additional basis for the exercise of federal authority is found in the fact that petitioner, as a result of advertising through media having a substantial out-of-State circulation (*supra,* p. 3), annually sells to out-of-State customers, merchandise valued at more than $150,000 (*supra,* p. 3).[4]

"affecting commerce." *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4). See also *McLeod* v. *Threlkeld*, 319 U. S. 491, 493.

[4] The maxim "*de minimis*" is not, as petitioner argues (Pet. 54), applicable here. It has been frequently held that the Act "cannot be applied by a mere reference to percentages." *Santa Cruz Fruit Packing Company* v. *National Labor Re-*

In determining whether the Act may be applied to petitioner's operations, the test is not merely, as petitioner suggests (Pet. 11, 12, 13, 25), the type of enterprise conducted, nor whether its relation to interstate commerce is "direct" or "indirect." It is now settled that in adopting the National Labor Relations Act, Congress intended to exercise the full scope of its power under the commerce clause. See *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607, and cases cited. In a recent statement of the scope of the commerce power, this Court in *Wickard* v. *Filburn,* 317 U. S. 111, 125, said:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

That test is met here. Stoppage of petitioner's operations would unquestionably exert a substantial economic effect upon the inflow of large

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lations Board, 303 U. S. 453, 467; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607–608; *National Labor Relations Board* v. *Crowe Coal Co.*, 104 F. (2d) 633, 639 (C. C. A. 8), certiorari denied, 308 U. S. 584; *National Labor Relations Board* v. *Central Missouri Tel. Co.*, 115 F. (2d) 563, 566 (C. C. A. 8); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 589 (C. C. A. 9).

amounts of products normally obtained from without the State, as well as on the outflow of commodities purchased by out-of-State customers. "If the flow of commerce is obstructed by labor disputes, it can make no difference from which direction the obstruction is applied." *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241. See *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 326; *National Labor Relations Board* v. *J. L. Hudson Co.,* 135 F. (2d) 380, 382, 383 (C. C. A. 6), certiorari denied, 320 U. S. 740.[5]

[5] Petitioner's reliance upon cases arising under the Fair Labor Standards Act, the Federal Trade Commission Act, and the Sherman Act (Pet. 28–56), is misplaced. See *McLeod* v. *Threlkeld,* 319 U. S. 491, 493; *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 520–521; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570–571; *Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 350–351; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 486, 490–493, 498, 500–501; *Wickard* v. *Filburn,* 317 U. S. 111. Nor are cases dealing with the question whether a particular state tax or police measure (Pet. 42) is in conflict with the commerce clause, applicable here. See *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 466; *Bacon* v. *Illinois,* 227 U. S. 504, 516; *Stafford* v. *Wallace,* 258 U. S. 495; *Minnesota* v. *Blasius,* 290 U. S. 1, 8. This Court has recently declared that the two cases under the Sherman Act on which petitioner places great reliance, namely, *Hopkins* v. *United States,* 171 U. S. 578 and *Anderson* v. *United States,* 171 U. S. 604 (Pet., 15, 38; 13, 50), are both out of harmony with its more recent decisions under the commerce clause. See *Wickard* v. *Filburn,* 317 U. S. 111, 122, n. 20.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1944.